

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

MARC MARTEL,

Plaintiff,

v.

**COMPUTER SCIENCES
CORPORATION,**

Defendant.

§
§
§
§
§
§
§
§
§
§
§

Civil Action No. 1:17-cv-00407

Judge McAuliffe

SUR-REPLY IN OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL

NOW INTO COURT, through undersigned counsel, comes Defendant Computer Sciences Corporation (“Defendant” or “CSC”) and hereby submits its Sur-Reply in Opposition to Plaintiff’s Motion to Compel in order to briefly respond to Plaintiff Marc Martel’s Reply to Opposition to Motion to Compel (the “Reply”).¹

1. In the Reply, Plaintiff does not refute the bases for CSC’s opposition in any way. Instead, Plaintiff speculates that theoretically Plaintiff may testify that he made a complaint to CSC’s ECO, that the ECO investigated his complaint, and that he was not told of the results of the investigation; Plaintiff then speculates that CSC *may* then argue that Plaintiff has opened the door and might use the Report of Investigation as rebuttal evidence. Plaintiff concludes that such use would constitute an impermissible “sword and shield”.² Plaintiff asserts ultimately, without any analysis or authority, that this future hypothetical justifies a current finding that CSC has impliedly waived a sacrosanct privilege. Simply put, Plaintiff’s speculation does not establish waiver and Plaintiff’s Motion to Compel should be denied.

¹ Rec. Doc. 27-1.

² *Id.* at ¶ 3.

2. Plaintiff's speculation does not provide a sufficient (let alone any) basis for the Court to conclude that Defendant is using attorney-client privilege information as both sword and a shield. Indeed, the cases cited by Defendant previously show that in order for an implied waiver to be found, the party claiming privilege must *actually* use the information as both a sword and a shield.³

3. Simply put, Plaintiff's rote and unsubstantiated speculation does not carry his burden of showing the Court that Defendant has used the Report of Investigation as both a sword and shield and thereby waived its privilege by implication. The Motion to Compel should therefore be denied.

WHEREFORE, Defendant Computer Sciences Corporation prays that after due proceedings are had, this Honorable Court deny Plaintiff Marc Martel's Motion to Compel.

Respectfully submitted this the 6th day of February, 2019.

/s/Bryan Edward Bowdler

Bryan Edward Bowdler (admitted *pro hac vice*)
The Kullman Firm, P.L.C.
1100 Poydras Street, Suite 1600
New Orleans, LA 70163
Telephone: (504) 524-4162
Facsimile: (504) 596-4144
E-mail: beb@kullmanlaw.com

/s/William D. Pandolph

William D. Pandolph (N.H. Bar # 5579)
Sulloway & Hollis P.L.L.C.
9 Capitol Street & 29 School Street
Concord, NH 03301

³ *Walker v. N.H. Admin. Office of the Courts*, 2013 WL 672584, at *6 (D.N.H. Feb. 22, 2013) ("Defendants have not sought to use attorney-client privilege or work product protection as a sword and shield..."); *accord Williams v. Sprint/United Management Co.*, 464 F. Supp. 2d 1100, 1108 (D. Kan. 2006); *Frazier v. Bd. of Cty. Comm'rs of Cty. of Arapahoe*, No. 08-cv-02730-WYD-BNB, 2010 WL 447785 at *3 (D. Colo. Feb. 3, 2010), *objections overruled sub nom. Frazier v. Bd. of Cty. Comm'rs of Cty. of Arapahoe*, 2010 WL 11553297 (D. Colo. June 24, 2010).

Telephone: (603) 224-2341
Facsimile: (603) 223-2934
E-mail: wpandolph@sulloway.com

F. Daniel Wood (admitted *pro hac vice*)
The Kullman Firm, P.L.C.
600 University Park Place, Suite 340
Birmingham, AL 35209
Telephone: (205) 871-5858
Facsimile: (205) 871-5874
E-mail: fdw@kullmanlaw.com

**COUNSEL FOR DEFENDANT,
COMPUTER SCIENCES
CORPORATION**

CERTIFICATE OF SERVICE

I certify that on February 6, 2019 I filed the foregoing using the Court's CM/ECF notice that will send electronic notice of filing to the following:

Lauren Simon Irwin, Esq.
Heather M. Burns, Esq.
Upton & Hatfield, LLP
10 Centre Street
P.O. Box 1090
Concord, NH 03302-1090
lirwin@upton-hatfield.com
hburns@upton-hatfield.com

/s/Bryan Edward Bowdler

Counsel for Defendant